

First Supplement to Memorandum 88-42

Subject: Study L-2009 - AB 2841 (Probate Referees and other problems)

Amendments to Restore Probate Referee Provisions to the Form in Which Introduced

Exhibit 1 to this Supplement sets out the amendment that would be made to AB 2841 if the \$250 cap on the commission for publicly traded stock were restored. Exhibit 1 also includes an alternate version of the \$250 cap as it would be if it were restored with an inflation escalator (which the probate referees are believed to be considering).

Exhibit 2 sets out the amendment that would be made if a probate referee were not appointed for the purpose of receiving notice of waiver.

Exhibit 3 sets out the amendments that would be made if the inventory and appraisal were permitted to be either separate or combined documents.

§ 404.5. Removal at pleasure of Controller

Section 404 continues existing Probate Code Section 1308(a) that the State Controller may revoke the appointment of a probate referee for violation of standards of training, performance, or ethics. However, Section 404 does not continue existing Probate Code Section 1308(b) that, "within any one year the Controller may also remove, at his pleasure, at least one probate referee, but not more than 10 percent of the probate referees in any one county." The reason the Commission omitted this provision is that the Commission was informed the provision has not been used in modern times, and the Comment to Section 1308(b) so states.

The State Controller (Exhibit 4) tells us we are misinformed:

This discretionary authority has been used in instances where the Controller believed that removal of a referee was in the best interest of the program but, under the particular circumstances, he did not feel that it was appropriate to remove the individual under subsection (a) of Probate Code Section 1308 for "noncompliance with any standard of

training, performance or ethics." One referee, for example, was removed in 1986 and one in 1988 under the discretionary provision.

The Controller believes that, while the provision is not used often, it is important to the integrity of the referee system for the Controller to have this authority. The Controller would oppose any substantive change in law on this point.

The staff believes this is a political matter that the Commission should not become involved in. We recommend that existing law be preserved. The staff would add the following new section between Sections 404 and 405 on page 35, line 30:

Notwithstanding Section 404, the Controller may revoke the appointment of a person to act as a probate referee at the pleasure of the Controller. Under this section, the Controller may revoke the appointment of not more than 10 percent of the probate referees in each county in any one calendar year, but may revoke the appointment of at least one probate referee in each county in any one calendar year.

§ 406. Political activities of probate referee

The existing limitations on political activities of probate referees are found in Sections 1311 and 1312. The Commission has made an effort to expand and clarify the limitations in Section 406. The staff would make the following changes beginning on page 36, line 2 of the bill as a result of Commission discussions at the January Commission meeting and in response to suggestions from the State Controller:

406. (a) ~~A probate referee, or any person who is an applicant for or seeking appointment or reappointment to act as a probate referee, shall not, directly or indirectly, solicit, receive, or contribute, or be in any manner involved~~
As used in this section, "prohibited political activity" means directly or indirectly soliciting, receiving, or contributing, or being in any manner involved in soliciting, receiving, or contributing, any of the following:

(1) Any assessment, subscription, or contribution to any party, incumbent, committee, or candidate exceeding two hundred dollars (\$200) in any one calendar year for any partisan public office of this state.

(2) An assessment, subscription, contribution, or political service in any amount for any campaign for the office of State Controller ~~in any amount, notwithstanding paragraph (1).~~

~~(b) A violation of subdivision (a) is a misdemeanor, and the State Controller shall revoke the appointment of a probate referee who violates subdivision (a).~~

~~(e) (b) Upon a person's application for appointment as a probate referee, and thereafter annually during the person's eligibility for appointment, in January of each year during the person's tenure as a probate referee, and during the person's eligibility for reappointment, the person shall file with the State Controller a verified statement indicating whether the person has done any act described in subdivision (a)(1) or (a)(2) engaged in prohibited political activity during the preceding two-year period two calendar years.~~

~~(d) (c) The State Controller may not appoint or reappoint as a probate referee any person who, within the two-year period preceding the date of the appointment or reappointment, violates any provision of this section preceding two calendar years has engaged in prohibited political activity, and any such appointment or reappointment is void and shall be revoked. The State Controller shall revoke the appointment of a person who, during the person's tenure as probate referee, engages in prohibited political activity. However, all acts not otherwise invalid performed by the person before revocation of the person's appointment are valid.~~

~~(d) A person shall not engage in prohibited political activity during the time the person is an applicant for appointment or reappointment, or during the person's tenure, as a probate referee. A violation of this subdivision is a misdemeanor.~~

~~(e) Subdivisions (a), (c), and (d) do not apply to any prohibited political activity that occurred before July 1, 1989, and the applicable law in effect before July 1, 1989, continues to apply. Subdivision (b) applies on July 1, 1989, to persons who apply for appointment on or after July 1, 1989; a person who applied for appointment or who was appointed before July 1, 1989, shall file the first statement required by subdivision (b) on or before July 1, 1989, and thereafter as prescribed in subdivision (b).~~

Please note that under existing law, a referee or person seeking appointment may not solicit, receive, or contribute any assessment, subscription, contribution, or political service "for any campaign" for the office of State Controller. The Commission's draft would preclude these activities whether in connection with a campaign or for any other purpose. The State Controller objects. "We are not aware of any problem arising under the existing language since its enactment 18 years ago. On the other hand, we don't know what questions might arise with your revision. For example, would appraising a piece of property as an accommodation to this office be a 'contribution' to the office of

Controller." See Exhibit 4. Because the staff believes this is a political matter that is inappropriate for Commission involvement, we propose to restore existing law on this point in subdivision (a)(2).

The staff has also reduced the number of filings required in subdivision (b) in response to the Controller's letter that annual statements are unwarranted except on appointment or reappointment, and during tenure as probate referee. "Under the circumstances, we believe it places an unnecessary burden on [unappointed] persons to require filing of annual statements, as well as an unnecessary burden on the Controller to establish a control and follow-up function to insure the annual statements are filed." See Exhibit 5.

§ 8903. Waiver of appraisal by probate referee

In connection with the procedure for waiving appraisal by a probate referee, it may be worth considering an additional protection against unwarranted objection to the waiver by a probate referee. A provision could be added that if the probate referee unreasonably objects to the waiver, the probate referee must pay the litigation expenses incurred by the personal representative. This could be done by an amendment to the bill on page 121, at line 28, along the following lines:

(d) A probate referee to whom notice is given under this section may oppose the waiver. If the petition is denied, opposition fails and the court determines the opposition was made without substantial justification, the court shall award litigation expenses, including reasonable attorney's fees, against the probate referee. If the opposition succeeds, the court shall designate a different probate referee to appraise property in the estate. Neither the probate referee who opposed the waiver nor any other probate referee in the same office or with whom the probate referee has a financial arrangement, shall appraise, share in the commission, or in any other manner benefit from the appraisal of property in the estate.

§ 8904. Appraisal by independent expert

The probate referees have pointed out that the bill would require automatic assessment of attorney's fees against a probate referee who opposes appraisal by an independent expert, even though there may have been reasonable cause for the opposition. Again, the staff would add a provision parallel to the one recommended above in the case of a referee's opposition to a waiver.

The probate referee may, within five days after delivery of the inventory, petition for a court determination whether the property to be appraised by an independent expert is a unique, artistic, unusual, or special item of tangible personal property. On the determination, If the petition fails and the court determines that the petition was made without substantial justification, the court shall award litigation expenses, including reasonable attorney's fees, to the prevailing party against the probate referee.

Respectfully submitted,

Nathaniel Sterling
Assistant Executive Secretary

EXHIBIT 1

Amendments to Restore \$250 Cap

8961. As compensation for services the probate referee shall receive all of the following:

(a) A commission of one-tenth of one percent of the total value of the property for each estate appraised, subject to ~~Section~~ Sections 8962 and 8963. The commission shall be computed excluding property appraised by the personal representative pursuant to Section 8901 or by an independent expert pursuant to Section 8904.

(b) Actual and necessary expenses for each estate appraised. The referee shall file with the inventory a verified account of the referee's expenses.

8962. Notwithstanding Section 8961, the commission and expenses received by the probate referee for appraising securities listed as of the date of the decedent's death on the New York Stock Exchange, the American Stock Exchange, or the Pacific Stock Exchange shall not exceed two hundred fifty dollars (\$250) in the aggregate.

8962. (a) Notwithstanding Section 8961, the commission and expenses received by the probate referee for appraising securities listed as of the date of the decedent's death on the New York Stock Exchange, the American Stock Exchange, or the Pacific Stock Exchange shall not exceed two hundred fifty dollars (\$250) in the aggregate.

(b) The dollar limitation provided in subdivision (a) shall be adjusted, and the adjusted amount shall be reported, by the Judicial Council effective January 1, 1991, and on January 1 of each odd-numbered year thereafter, to reflect changes in the value of the dollar. Such adjustments shall be made by multiplying the base amount by the percent change in the California Consumer Price Index as compiled and reported by the California Department of Industrial Relations, with the result rounded to the nearest dollar.

Comment. Subdivision (b) is drawn from Government Code Section 72056.5 (municipal court filing fees).

EXHIBIT 2

Amendments to Restore Existing Waiver Procedure

8903. (a) The court may, for good cause, waive appraisal by a probate referee in the manner provided in this section.

(b) The personal representative may apply for a waiver together with the petition for appointment of the personal representative or together with another petition, or may apply for a waiver in a separate petition filed in the administration proceedings, but the application may not be made later than the time the personal representative delivers the inventory to the probate referee, if a probate referee has been designated. A copy of the proposed inventory and appraisal and a statement that sets forth the good cause that justifies the waiver shall be attached to the petition.

(c) The hearing on the waiver shall be not sooner than 15 days after the petition is filed. Notice of the hearing on the petition shall be given as provided in Section 1220, together with a copy of the petition and a copy of the proposed inventory and appraisal. In addition to the notice required by this subdivision, notice of the hearing, together with a copy of the petition and a copy of the proposed inventory and appraisal, shall be given as provided in Section 1220 to all of the following persons:

(1) Each known heir whose interest in the estate is affected by the waiver.

(2) Each known devisee whose interest in the estate is affected by the waiver.

(3) The State of California if any portion of the estate is to escheat to it and its interest in the estate is affected by the waiver.

(4) The probate referee, if a probate referee has been designated. ~~If a probate referee has not been designated and the proposed inventory and appraisal includes an interest in real property, the court shall designate a probate referee to whom notice of hearing shall be given.~~

(d) A probate referee to whom notice is given under this section may oppose the waiver. If the petition is denied, the court shall designate a different probate referee to appraise property in the estate. Neither the probate referee who opposed the waiver nor any other probate referee in the same office or with whom the probate referee has a financial arrangement, shall appraise, share in the commission, or in any other manner benefit from the appraisal of property in the estate.

(e) If the petition is granted, the inventory and appraisal attached to the petition shall be filed pursuant to Section 8800.

Note. Subdivision (d) was added by the Assembly Judiciary Committee at the same time as the provision for appointment of a referee to receive notice of waiver. However, the subdivision appears appropriate whether or not a referee is appointed solely for the purpose of receiving notice, and the staff would leave it in the bill.

EXHIBIT 3

Amendments to Provide for Separate Inventory and Appraisal

CHAPTER 1. GENERAL PROVISIONS

8800. (a) The personal representative shall file with the court clerk an inventory of property to be administered in the decedent's estate ~~together with~~ and an appraisal of property in the inventory. An inventory and appraisal shall may be combined in a single document.

(b) ~~The inventory and appraisal shall be filed within four months~~ inventory shall be filed within three months, and the appraisal shall be filed within six months, after letters are first issued to a general personal representative. The court may allow such further time for filing an inventory and or an appraisal as is reasonable under the circumstances of the particular case.

(c) The personal representative may file partial inventories and or partial appraisals where appropriate under the circumstances of the particular case, but all inventories and appraisals shall be filed before expiration of the time allowed under subdivision (b).

8801. If the personal representative acquires knowledge of property to be administered in the decedent's estate that is not included in a prior inventory ~~and---appraisal~~, the personal representative shall file a supplemental inventory and an appraisal or supplemental appraisal of the property in the manner prescribed for an original inventory and an original appraisal. ~~The supplemental inventory and appraisal shall be filed within four months~~ inventory shall be filed within three months, and the supplemental appraisal shall be filed within six months, after the personal representative acquires knowledge of the property. The court may allow such further time for filing a supplemental inventory and or a supplemental appraisal as is reasonable under the circumstances of the particular case.

8802. The inventory ~~and appraisal~~ shall separately list each item ~~and shall~~ . The appraisal shall state the fair market value of the ~~item~~ each item in the inventory at the time of the decedent's death in monetary terms opposite the item.

8803. Upon the filing of an ~~inventory and appraisal or a supplemental inventory and appraisal~~ inventory, supplemental inventory, appraisal, or supplemental appraisal, the personal representative shall, pursuant to Section 1252, mail a copy to each person who has requested special notice.

8804. If the personal representative refuses or negligently fails to file an inventory ~~and~~ or appraisal within the time allowed under this chapter, upon petition of an interested person:

(a) The court may compel the personal representative to file an inventory or appraisal pursuant to the procedure prescribed in Section 921.

(b) The court may remove the personal representative from office.

(c) The court may impose on the personal representative personal liability for injury to the estate or to an interested person that directly results from the refusal or failure. The liability may include attorney's fees, in the court's discretion. Damages awarded pursuant to this subdivision are a liability on the bond of the personal representative, if any.

Rev. & Tax. Code § 480(b):

(b) The personal representative shall file a change in ownership statement with the county recorder or assessor in each county where the decedent owned real property at the time of death. The statement shall be filed at the time the inventory ~~and appraisal~~ is filed with the court clerk.



CLAW REV. COMMISSION

MAR 31 1988

RECEIVED

GRAY DAVIS

Controller of the State of California

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March 29, 1988

Mr. Nathaniel Sterling
California Law Revision Commission
4000 Middlefield Rd., Rm. D-2
Palo Alto, CA 94303

Dear Mr. Sterling:

This is in reference to our telephone conversation yesterday regarding A.B. 2841 (Harris).

As discussed with you, the Controller's Office is concerned with the revisions made in provisions pertaining to Probate Referees in proposed Probate Code Sections 400 to 406, commencing at page 32 of the amended bill. The existing provisions of law are contained in Probate Code Sections 1300, et seq.

Under subsection (b) of Section 1308, the Controller presently has the authority to remove at his pleasure within any one year "at least one probate referee, but not more than 10 percent of the probate referees in any one county." Since its enactment in 1970 in Revenue and Taxation Code Section 14773, this provision has been interpreted as allowing the Controller the discretion of removing at least one referee per county, or up to 10% of the referees in counties having 20 or more referees (Los Angeles County).

This discretionary authority has been used in instances where the Controller believed that removal of a referee was in the best interest of the program but, under the particular circumstances, he did not feel that it was appropriate to remove the individual under subsection (a) of Probate Code Section 1308 for "noncompliances with any standard of training, performance or ethics." One referee, for example, was removed in 1986 and one in 1988 under the discretionary provision.

Mr. Nathaniel Sterling
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While this provision is not used often, we believe it is important to the integrity of the referee system for the Controller to have such authority. For this reason, the Controller's Office would oppose any substantive change of the law in this regard. Accordingly, we request that the following be added to proposed Section 404 (page 34 of the amended bill):

(c) Notwithstanding the provisions of subdivision (b), within any one year the Controller may also remove, at his pleasure, at least one probate referee, but not more than 10 percent of the probate referees in any one county.

In addition to the above, we also request that you consider several other technical amendments to the probate referee sections:

- (1) On page 33, line 2, delete "administered by the State Personnel Board".

On page 33, lines 13-14, delete "the State Personnel Board", and substitute: "another agency".

On page 33, lines 22-23, delete "by the State Personnel Board".

On page 33, line 24, delete "State Personnel Board", and substitute: "agency administering the examination".

These changes result from the fact the State Personnel Board no longer administers examinations. Presently, we contract for the examination to be administered by Cooperative Personnel Services which is an agency set up through a joint powers arrangement.

- (2) On page 34, line 35, after the word "service", insert: "for any campaign".

This reference to any campaign is in the existing law. I don't know why it was deleted in your revision; however, the deletion may suggest that a substantive change was intended. We are not aware of any problem arising under the existing language since its enactment 18 years ago. On the other hand, we don't know what questions might arise with your revision. For example, would appraising a piece of

Mr. Nathaniel Sterling

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property as an accommodation to this office be a
"contribution" to the office of Controller?

During our conversation, you indicated that there should be no problem in including the 10% removal provision and the other technical amendments in the bill. If, however, there may be some question or opposition by the Commission to these changes, I would appreciate your notifying me as soon as possible so that we might consider other alternatives.

Again, I regret that there might have been a breakdown in communications on this bill between our two agencies. If any matters should arise which you believe may involve the Controller's Office, please let me know and I will make sure that you receive a response.

Thank you for your cooperation.

Very truly yours,

GRAY DAVIS, STATE CONTROLLER

By


Lawrence E. Gercovich
Deputy Controller

LEG:df



CA LAW REV. COMM'N

APR 19 1988

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April 12, 1988

Mr. Nathaniel Sterling
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Palo Alto, CA 94303-4739

Dear Mr. Sterling:

Thank you for your letter of April 4 concerning A.B. 2841.

After my March 29 letter, another provision in the bill pertaining to probate referees was called to my attention. Subdivision (c) of proposed § 406 (pp. 34-35 of the amended bill) requires verified statements to be filed with the Controller concerning compliance with the prohibitions on political activity. This filing requirement applies:

"Upon a person's application for appointment as probate referee, and thereafter annually during the person's eligibility for appointment, during the person's tenure as a probate referee, and during the person's eligibility for reappointment [sic] . . ."

Our current practice is to have everyone passing the probate referee qualifying examination complete and sign a Personal Data Questionnaire which includes questions paraphrasing the statutory language of the prohibitions in Probate Code Sections 1311 and 1312. Thereafter, if the applicant is actually appointed as referee, the person is again required to sign a statement that the applicant has "read, understand and will, without reservation, comply with Sections 1311 and 1312."

If a person passes the qualifying exam, he or she remains eligible for appointment for a period of five years. Many persons not initially appointed, may never actually receive

Mr. Nathaniel Sterling
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appointments as referees. Under the circumstances, we believe it places an unnecessary burden on these persons to require filing of annual statements, as well as an unnecessary burden on the Controller to establish a control and follow-up function to insure that the annual statements are filed.

In our view, the current practice is adequate in obtaining such statements upon passing of the examination and prior to appointment. The same would seem to be true with respect to a referee whose term has expired and is subsequently reappointed. A statement of compliance with the statutory prohibitions would be obtained as a condition of reappointment.

As to the proposal for annual statements from referees during their tenure, we would have no objection to this requirement. Such a statement could be incorporated with the annual income report that referees must presently file with the Controller's Office.

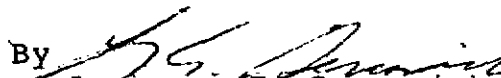
For the reasons discussed above, therefore, we request that subsection (c) of proposed § 406 be amended to read:

Upon a person's appointment, and thereafter
annually during the person's tenure, as probate
referee, the person shall file with the Controller . .
.."

Please let me know if there is additional information I can provide on this matter.

Very truly yours,

GRAY DAVIS, STATE CONTROLLER

By 
Lawrence E. Gercovich
Deputy Controller

LEG:df

cc: Mr. Tucker
: Mr. Siedorf